Chicago-Kent Law Review

Volume 87
Issue 2 *Women's Legal History: A Global Perspective*

Article 17

April 2012

Dueling Values: The Clash of Cyber Suicide Speech and the First Amendment

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DUELING VALUES: THE CLASH OF CYBER SUICIDE SPEECH AND THE FIRST AMENDMENT

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INTRODUCTION**

> Societies now face a grave ethical dilemma in relation to the internet. Western societies pride themselves on freedom of speech, yet here we have a medium which has the potential to circumvent the traditional social controls.1

Late on March 9, 2008, Canadian college student Nadia Kajouji left the warmth of her Carleton University dorm room, walked to a nearby bridge, and jumped to her death in the icy Rideau River.2 Six weeks later, during the spring thaw, her body was found.3 She was not yet nineteen.4 In the days before her death, Kajouji, who had spiraled into depression after a romantic breakup and a miscarriage, researched suicide methods online.5 A forensic search of her computer later revealed that she had asked for advice at the pro-suicide newsgroup alt.suicide.holiday, writing that she had been depressed for as long as she could remember, was terrified her suicide attempt would fail, and wanted a "quick out" with "the highest chance of success."6

Cami, a young and sympathetic nurse, also suicidal, was one of those who responded. Cami proposed that she and Nadia enter into a

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** In December 2011, a prepublication draft of this note was made available to the Assistant Rice County Attorney in connection with preparation of the state's appeal brief for State v. Melchert-Dinkel, filed January 30, 2012.

1. Pierre Baume, Christopher H. Cantor & Andrew Rolfe, *Cybersuicide: The Role of Interactive Suicide Notes on the Internet*, 18 J. CRISIS INTERVENTION & SUICIDE PREVENTION 73, 78 (1997).

2. Beth Johnston, *Man Allegedly Coaxed Canadian's Suicide*, OTTAWA SUN, Feb. 26, 2009, http://cnews.canoe.ca/CNEWS/Crime/2009/02/26/8538881-sun.html.

3. *Id.*

4. State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 15 (D. Minn. Mar. 15, 2011).

5. *Kajouji's Video Diary Shows Path to Suicide*, CBC NEWS CANADA, http://www.cbc.ca/news/canada/ottawa/story/2009/10/09/ottawa-kajouji-fifth-estate-diary-suicide.html (last updated Oct. 9, 2009).

6. *Melchert-Dinkel*, No. 66-CR-10-1193, at 15–16.

suicide pact and tried hard to persuade Nadia to hang herself.[7] It was quick, painless and effective.[8] She told Nadia what kind of rope to buy and where to get it, and said that if Nadia had a web cam, she, Cami, could watch to make sure that Nadia positioned the rope just right.[9] Once Nadia was dead, Cami would hang herself.[10]

Eventually, the police discovered that "Cami" was one of several online aliases used by William Melchert-Dinkel, a forty-seven year old nurse from Minnesota who has characterized himself as having an "obsession" with suicide.[11] Some two years after Nadia Kajouji died, the state of Minnesota charged Melchert-Dinkel with two counts of assisted suicide in connection with her death and the 2005 death of Mark Drybrough, a British man who hanged himself by following detailed instructions allegedly provided by Melchert-Dinkel in an email.[12]

In the past decade, thousands of readily-accessible, suicide-related web sites have proliferated on the internet.[13] Many of these sites are "pro-suicide"—that is, they do not seek to prevent suicide but accept it as a viable life choice, may facilitate suicide pacts, and may allow the exchange of detailed information on suicide methods to flow un-

7. *Id.* at 16–19.

8. *Id.* at 23.

9. *Id.* at 21.

10. State's Omnibus Brief at 2, *Melchert-Dinkel* (No. 66-CR-10-1193).

11. Complaint & Statement of Probable Cause at 3, *Melchert-Dinkel* (No. 66-CR-10-1193).

12. *Id.* at 1. In March 2011, the trial court convicted Melchert-Dinkel of two counts of assisted suicide under Minnesota Statute 609.215, rejecting the argument that his speech was protected by the First Amendment. *Melchert-Dinkel*, No. 66-CR-10-1193, at 31–32, 41–42. On November 4, 2011, Melchert-Dinkel filed an appeal with the Minnesota Court of Appeals. He argues that "the trial court created a new category of prohibited speech, in violation of U.S. Supreme Court rulings." *Ex-nurse Appeals Encouraging Suicides Conviction,* CBS MINNESOTA.COM, Nov. 4, 2011 http://minnesota.cbslocal.com/2011/11/04/ex-nurse-appeals-encouraging-suicides-conviction/. The case is State v. Melchert-Dinkel. *See* Minn. App. Ct. Case Mgmt. System, http://macsnc.courts.state.mn.us/ctrack/publicLogin.jsp, Case No. A110987.

13. Adekola O. Alao et al., *Cybersuicide: Review of the Role of the Internet on Suicide*, 9 CYBERPSYCHOL. & BEHAV. 489, 490 (2006) (stating that "[t]here are more than 100,000 web sites on the internet that deal with methods of committing suicide"); *see also* Recupero et al., *Googling Suicide: Surfing for Suicide Information on the Internet*, 69 J. CLINICAL PSYCHIATRY 878, 878 (2008) (stating that "[t]he internet... features numerous resources for the suicidal person, ranging broadly from support groups or crisis intervention sites discouraging individuals from committing suicide to pro-suicide groups and how-to-suicide instructions that would not otherwise be easily accessible to the average suicidal person"); Lucy Biddle et al., *Suicide and the Internet*, 336 BRIT. MED. J. 800 (2008). Biddle and her colleagues hypothesized that "most people use [popular] search engines" and "rarely look beyond the first page of results," and conducted simple searches for suicide methods using several popular search engines. A review of the first ten hits from each search yielded 240 discrete sites, ninety of which "were dedicated suicide sites. Half of these were judged to be encouraging, promoting or facilitating suicide."

checked through message boards, chats and emails.[14] Disturbing as this is, no current law explicitly prohibits it, even though media reports and small-scale case studies in the psychiatric literature suggest a direct link between visits to suicide chat rooms and completed suicides.[15]

This Note will explore how some speech which would otherwise be punishable currently flourishes unchecked on the internet, thus "circumvent[ing] [] traditional social controls."[16] Application of assisted suicide laws to cyber speech may occur infrequently. But where it does, punishment of this speech should not automatically be foreclosed by the First Amendment. Assisted suicide is currently unlawful in the majority of states, as it has been for hundreds of years in Anglo-American society. The First Amendment has never protected speech which is an integral part of criminal conduct,[17] and that principle should not be changed for cyber speech.

Part I of this Note provides background information on suicide-related cyber space. Part II summarizes relevant First Amendment and assisted suicide law. Part III analyzes two kinds of suicide-related cyber speech—encouraging suicide, and assisting or "teaching" suicide by providing detailed suicide methods—and explores how they fare under several traditional First Amendment doctrines. It concludes that suicide-related cyber speech should not be analyzed under the Court's test for illegal advocacy; rather, speech which counsels or encourages suicide—including cyber-suicide speech—should be identified as a traditional category of unprotected speech, or, alternatively, analyzed under strict scrutiny. Part IV presents a brief conclusion.

14. *See, e.g.*, Recupero, *supra* note 13, at 879 (noting the existence of "pro-suicide or 'pro-choice' suicide forums that not only avoid discouraging [users] from suicide, but sometimes go so far as to provide them with step-by-step suicide instructions or with the necessary means and encouragement to carry out a suicide attempt."); Baume, *supra* note 1, at 77 (hypothesizing that young man participating in suicide newsgroup "may have felt compelled by his internet participation to follow through with suicide," and positing that "were it not for his public commitments he might have been able to adopt a more constructive approach to problem-solving without losing face."). *See also About ASH*, http://ash2.wikkii.com/wiki/About_ASH (last visited Oct. 4, 2010) (stating that purpose of the web site is "to provide suicidal people and those suffering from a severe physical illness with the ability and freedom to make a fair, well-informed and unforced choice about whether they should live or die.").

15. *See generally* Brian L. Mishara & David N. Weisstub, *Ethical, Legal and Practical Issues in the Control and Regulation of Suicide Promotion and Assistance over the Internet*, 37 SUICIDE & LIFE-THREATENING BEHAV. 58 (2007) (stating that although anecdotal evidence links visits to suicide chat rooms with completed suicides, causation issues may limit application of existing assisted suicide laws to the internet; and noting that there are free speech concerns with controlling access to suicide chat rooms).

16. Baume, *supra* note 1.

17. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

I. SUICIDE ON THE INTERNET

Web sites, chat rooms and forums in suicide-related cyber space are examples of "extreme communities" online. Researcher Vaughan Bell, who has studied the link between the internet and mental health. theorizes that because internet speech is uncensored, widely-separated and formerly-isolated people with "views considered extreme or unacceptable" can now form communities with like-minded others.[18] Some extreme communities are centered on bizarre beliefs or self-destructive activities.[19] Such groups may give members the impetus and information needed to accomplish self-destructive acts that result in illness, severe injury or death.[20]

Cyber space is brimming with web sites, newsgroups, message boards, forums and chat rooms devoted to suicide-related information and discussions.[21] Researchers generally characterize web sites and chat rooms[22] as "pro-suicide" if they seem to be "encouraging, promoting or facilitating suicide."[23] Sites categorized as pro-suicide take the position that all people should have the right to end their lives at any

18. Vaughan Bell, *Online Information, Extreme Communities and Internet Therapy: Is the Internet Good for Our Mental Health?*, 16 J. MENTAL HEALTH 445, 449 (2007).

19. *Id.* at 450. For example, one community of "likely-psychotic" people "reject[s] any medical explanation of their experiences and instead argue[s] that they are the [sic] subject to 'mind control' technology."

20. *Id.* Bell notes the extreme case of "a middle-aged male who self-amputated both legs after expressing a lifelong desire to be an amputee (a condition named apotemnophilia). The man in question reported that his participation with other members of an online discussion group (for those wanting to be amputees) 'deepened his motivation, developed the means, and finalized his determination to act on his desire.'" *Id.*

21. Alao, *supra* note 13, at 490; *see also* Susan Thompson, *The Internet and its Potential Influence on Suicide*, 23 PSYCHIATRIC BULL. 449 (1999). Speech on pro-suicide web sites and forums may be roughly divided between non-interactive web site content maintained by a site administrator, and interactive, user-generated content. Interactive content could include message board or newsgroup postings, and chat room, forum, text and email messages, e.g., messages of personal support; general discussion unrelated to suicide; philosophical conversation about suicide; offers and specific plans to enter into suicide pacts; speech encouraging suicide; and speech which could assist another in committing suicide by providing specific details on suicide methods.

22. This Note uses the term "web site" to refer to non-interactive internet sites where information and links are posted. Although there are technically differences among them, I use the terms "chat room," "newsgroup," "message board," and "forum" somewhat interchangeably to refer to sites where users can interact with each other, either by posting messages that others can reply to at their leisure, or in real time chats.

23. *See, e.g.*, Biddle, *supra* note 13, at 800. *See also* Recupero, *supra* note 13, at 882. Recupero and her colleagues studied the availability and type of suicide-related sites on the internet; they found that approximately 11% of sites reviewed had "a pro-suicide bias or slant," approximately 31% were "neutral" or balanced between pro- and anti-suicide views, and 29% were suicide-prevention or anti-suicide sites. The numbers do not total 100% because 9% of the sites would not load and 20% of the sites were only peripherally related to suicide "(eg [sic], rock band's homepage, movie or novel with suicide in the title)."

time, regardless of whether they are terminally ill,[24] and may post "methods files" containing detailed instructions on how to commit suicide.[25] In addition, "how-to" information may be traded on message boards, in private chats or in emails.[26] As a result, anyone can easily access suicide methods online, either by asking for advice and information on suicide forums or by searching "methods files" archived on a web site or 'wiki.'[27] For example, one young woman sought and received tips from members of a suicide forum enabling her to pose as jeweler and purchase poison that she later used to kill herself.[28] In another case, a young husband came home to find his wife dead and the computer still on, with detailed instructions on hanging still up on the screen.[29]

Although there are many reported case studies and newspaper articles linking individual suicides to participation in suicide chat rooms or to detailed suicide methods information posted on web sites, there is no evidence which conclusively supports this.[30] However, given the "near-ubiquitous" internet use in adolescents and young adults as well as a significant suicide rate in these age groups, it is easy to see why mental health professionals are alarmed.[31] Perhaps the strongest of

24. *About ASH*, *supra* note 14 (stating that purpose of the web site is "to provide suicidal people and those suffering from a severe physical illness with the ability and freedom to make a fair, well-informed and unforced choice about whether they should live or die.").

25. *See, e.g., Archive*, ALT.SUICIDE.METHODS, http://archive.ashspace.org/asm_guide/ (last visited Nov. 28, 2011). To access, go to http://en.wikipedia.org/wiki/Alt.suicide.holiday, scroll to External Links section, click on link for ashspace.org (http://ashspace.org/), scroll down, and click on link for alt.suicide.methods_reference.

26. *See., e.g.,* Alao, *supra* note 13 (discussing availability of suicide information in chat rooms and web sites); *see also* State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 6-25 (D. Minn. Mar. 15, 2011) (detailing email correspondence and chat room conversations between William Melchert-Dinkel and victims Nadia Kajouji and Mark Drybrough). Forensic searches of Kajouji's and Drybrough's computers showed that after they posted requests for advice on killing themselves online, Melchert-Dinkel communicated with them via chat rooms and email.

27. *See, e.g., Archive*, *supra* note 25.

28. Ellen Luu, Note, *Web-Assisted Suicide and the First Amendment*, 36 HASTINGS CONST. L.Q. 307, 308 (2009).

29. *Id.*

30. Ajit Shah, *The Relationship Between General Population Suicide Rates and the Internet: A Cross-National Study*, 40 SUICIDE & LIFE-THREATENING BEHAV. 146, 147 (2010). Shah conducted a broad-based study which attempted to correlate the prevalence of a country's internet users with its general suicide rates. He reviewed data from seventy-five countries, and concluded that there was a positive correlation for both sexes (i.e., that countries with the highest percentage of internet users also had the highest suicide rates). However, he cautioned that more research was needed before drawing conclusions on causality. *Id.* at 149.

31. A December 2009 survey by Pew Research Organization found that 74% of all Americans use the internet. Among Americans 30-49, the figure is 81%; among young adults 18-29, that figure rises to 93%. Lee Rainie, *Internet, Broadband and Cell Phone Statistics* 2, PEW INTERNET & AM. LIFE PROJECT (Jan. 5, 2010), http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_December09_update.pdf.

their concerns is the presence of "vulnerable populations"—minors and persons with psychiatric disorders—with uncontrolled access to pro-suicide web sites.[32] In these sites, suicide may be encouraged or taken for granted as a rational problem-solving method.[33] The sites—or the users themselves—may prohibit or reject messages discouraging suicide,[34] thus creating an unbalanced environment that could trigger suicidal behavior in a vulnerable person.[35] Sometimes, discussion begun in online chats or message boards is continued in private emails. For example, in response to a posting by Mark Drybrough requesting "details of hanging methods where there isn't access to anything high up to tie the rope to," William Melchert-Dinkel sent Drybrough several emails with detailed information on how to successfully hang himself.[36]

Suicide chat rooms also serve as meeting places for individuals who want to enter into suicide pacts.[37] The resulting number of suicides seems to be increasing: In the past ten years, multiple deaths

Among teens 12–17, the figure is also 93%. Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickuhr, *Social Media and Mobile Internet Use Among Teens and Young Adults* 4 PEW INTERNET & AM. LIFE PROJECT (Feb. 3, 2010), http://pewinternet.com/~/media//Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf (figures for teens 12–17 as of September 2009). According to the American Association of Suicidology, the 2007 suicide rate for all Americans was 11.5 deaths per 100,000 persons. *Suicide in the U.S.A. Based on Current (2007) Statistics*, AM. ASSOC. SUICIDOLOGY (2010), http://www.suicidology.org/c/document_library/get_file?folderId=232&name=DLFE-244.pdf. Suicide is the third leading cause of death among those 15–24, accounting for 12.2% of all deaths in that age group. *Youth Suicide Fact Sheet* 1, AM. ASSOC. SUICIDOLOGY (2010), http://211bigbend.net/PDFs/YouthSuicideFactSheet.pdf. One out of every twelve college students has made a suicide plan, and at least 1,000 of them follow through annually. *Id.* at 4. Even younger children are not immune: In 2007, the deaths of 119 American children between the ages of ten and fourteen were attributed to suicide. *Id.* at 2. Most adolescents who kill themselves do so at home after school. *Id.* at 3.

32. Mishara, *supra* note 15, at 63.

33. *About ASH*, *supra* note 14. *See also* Rebecca Sinderbrand, *Q&A: 'Groups Like Ours Will Always Exist*, NEWSWEEK WEB EXCLUSIVE, Nat'l Aff., June 24, 2003, *available at* LEXIS (quoting SR-71A, administrator of ASH Web site, as saying that "[t]he main purpose of the site is rational, open discussion about suicide, with an emphasis on individual liberty and autonomy.").

34. Baume, *supra* note 1, at 75; Thompson, *supra* note 21, at 450 (noting that the newsgroup alt.suicide.holiday "specifies that messages of discouragement or religious disapproval will not be tolerated.").

35. *See, e.g.*, Recupero, *supra* note 13, at 879 (noting the concern that "pro-suicide attitudes endorsed by groups in chat rooms or online suicide forums may lead vulnerable individuals ambivalent about suicide to decide to attempt suicide rather than to seek help"). *But see* Sinderbrand, *supra* note 33 (quoting SR-71A as saying that "[t]he media presents suicide cases as if they have been caused by online forums. In reality, if you have a forum of suicidal people then some will commit suicide, regardless of the subject. The real question is whether the rate of suicide on online forums is less or greater than the rate of suicide for people who are suicidal yet do not have or find access to such forums.").

36. State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 7–14 (D. Minn. Mar. 15, 2011).

37. Mishara, *supra* note 15, at 59.

have been reported in Asia and Europe as a result of suicide pacts originating online.[38] Perhaps more frightening—if less common—is the existence of online predators in suicide forums. William Melchert-Dinkel told police that "he most likely encouraged dozens of persons to commit suicide, and characterized it as the thrill of the chase."[39] Melchert-Dinkel seems almost benign compared to Gerald Krein, who was charged in 2005 with solicitation to commit murder when he tried to set up a Valentine's Day mass suicide online.[40] In contrast, however, some researchers believe that suicide forums can actually offer positive benefits for suicidal people,[41] and some suicide forum users have reported finding a valuable sense of support and community.[42]

38. *Id.* One source reports that between 2003 and 2005, "180 people died in 61 reported cases of Internet-assisted group suicide in Japan." David Samuels, *Let's Die Together: Why is Anonymous Group Suicide so Popular in Japan*, ATLANTIC (May 2007), http://www.theatlantic.com/magazine/archive/2007/05/let-8217-s-die-together/5776/. In England, one seventeen-year-old entered into a suicide pact with girls she met in a suicide forum and successfully completed suicide. Jonathan Owen, *Teens Die After Logging into 'Suicide Chat Rooms,'* INDEPENDENT (London), Sept. 10, 2006, http://www.independent.co.uk/news/uk/this-britain/teens-die-after-logging-into-suicide-chat-rooms-415386.html. In 2003, a Scottish man who entered into a suicide pact with a stranger he met online was charged with aiding and abetting suicide. Mishara, *supra* note 15, at 59.The Scot was talked out of killing himself at the last minute, but his companion completed suicide. *Id.*

39. Statement of Probable Cause, *supra* note 11, at 4.

40. Mishara, *supra* note 15, at 59; Rukmini Callimachi, *Man has History of Trying to Organize Suicides, Police Say*, FORT WORTH STAR-TELEGRAM, Feb. 14, 2005, *available at* 2005 WLNR 2059229.

41. *See, e.g.*, Darren Baker & Sarah Fortune, *Understanding Self-Harm and Suicide Web Sites*, 29 CRISIS 118, 119 (2008) (noting the tendency of researchers to ignore the positive aspects of suicide web sites unless they are "the *right sort* of web sites, such as those which advise acutely suicidal people to seek professional help.") (emphasis in original).

42. *Id. See also* Sinderbrand, *supra* note 33 (quoting SR-71A as saying that "I, personally, am alive because of the existence of the site and the channel. Being accepted by persons intrinsically understanding my thoughts and emotional pain made it much easier to talk about them."); Christiane Eichenberg, *Internet Message Boards for Suicidal People: A Typology of Users*, 11 CYBERPSYCHOL. & BEHAV. 107, 108 (2008). To assess whether suicide forums are actually harmful, Eichenberg studied 164 users of a popular German suicide forum. Using a detailed questionnaire, she identified three user types. Type 1, the "ambivalent help-seeking" group, comprised 21% of the sample. These users had the highest level of destructive (i.e. suicidal) motives, but also sought to participate in the forum for constructive reasons. Type 2, the "unspecifically motivated type," comprised 31% of the sample. These users were not strongly focused "on themselves or on others in connection with suicidal problems." Type 3, the "constructive help-seeker" group, comprised 48% of the sample. These users had virtually no destructive motives and were constructively motivated to seek and provide support with others sharing similar thoughts and feelings. Thus, Eichenberg concluded that for the large majority of users, this suicide forum appeared to provide some benefit in managing suicidal thoughts rather than increasing the risk of suicide. *Id* at 111–112.

II. LEGAL BACKGROUND

A. *Suicide and Assisted Suicide*

> Opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.[43]

Assisted suicide is a criminal offense in the majority of states, as it has been for hundreds of years in Western society.[44] At common law, those who encouraged or assisted a suicide were viewed as principals in the second degree if they were present at the suicide, and as accessories before the fact if they were not.[45] The Model Penal Code criminalizes assisted suicide because of the potential deterrent effect.[46] Moreover, a law permitting a person to take another's life, even with consent, would threaten the state's interests in protecting "the sanctity of life," and would be inconsistent with laws criminalizing homicide.[47]

In contrast, suicide is no longer a statutory crime in the United States,[48] although it is still considered wrongful.[49] The decriminalization of suicide occurred gradually. In sixteenth-century England, suicide was considered "an Offence against Nature, against God, and against the King"[50]; it was a felony punishable by "ignominious burial" and forfeiture of one's land and goods to the Crown[51]; and was considered a form of murder.[52] The same approach was adopted in the early American colonies; however, common-law penalties were abandoned over time as states acknowledged the futility of imposing sanctions on the suicide and her family.[53] The last U.S. conviction for attempted suicide occurred in North Carolina in 1961[54]; the last U.S. statute rec-

43. Washington v. Glucksberg, 521 U.S. 702, 711 (1997).

44. *Id.*

45. Catherine D. Shaffer, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 349 (1986).

46. MODEL PENAL CODE § 210.5(2) cmt. at 100 (1980).

47. *Id.*

48. Shaffer, *supra* note 45, at 348. Suicide is still a common law crime or a crime of moral turpitude in a tiny minority of states, but it is rarely, if ever, punished. *See* 83 C.J.S. *Suicide* § 5 (2010).

49. *Glucksberg*, 521 U.S. at 714. An action is unlawful, or "wrongful" in this sense when it is "contrary to moral standards." SHORTER OXFORD ENGLISH DICTIONARY 3446 (6th ed. 2007). This Note assumes that suicide is unlawful (contrary to moral standards) but not illegal.

50. *Glucksberg*, 521 U.S. at 712, n.10 (quoting Hales v. Petit, 1 Plowd. Com. 253, 261, 75 Eng. Rep. 387, 400 (1561-1562)).

51. MODEL PENAL CODE § 210.5(2) cmt. at 91-92.

52. *Id.* at 92, nn.1-2.

53. *Glucksberg*, 521 U.S. at 713.

54. *See* MODEL PENAL CODE § 210.5(2) cmt. at 94, n.11 and accompanying text.

ognizing attempted suicide as a crime was repealed in 1976 by the state of Oklahoma.[55] Similarly, the Model Penal Code does not criminalize suicide[56]; according to the drafters, the threat of punishment is unlikely to deter someone from taking her own life.[57]

The decriminalization of suicide has led some people to call for the decriminalization of assisted suicide. Most of the debate has centered in the area of physician assisted suicide. In 1997, the Supreme Court upheld two assisted suicide laws against constitutional challenges. Both cases arose in the context of end-of-life considerations for terminally ill, suffering people. In *Washington v. Glucksberg*, the respondents, physicians who wanted to assist these patients in ending their lives, sought a declaratory judgment that Washington's assisted suicide statute was unconstitutional on its face.[58] They argued that a mentally competent, terminally ill person's right to choose physician-assisted suicide is a protected liberty interest under the Fourteenth Amendment.[59] In *Vacco v. Quill,* the petitioners, also physicians, argued that New York's assisted suicide law violated the Equal Protection Clause, because terminally ill patients on life support had the right to refuse or terminate life-saving medical treatment, while all other terminally ill patients were denied the right to active assistance in ending their lives.[60]

The Court rejected both arguments, holding in *Glucksberg* that the right to assistance in suicide is not a fundamental liberty interest protected by the Fourteenth Amendment,[61] and holding in *Vacco* that because the right to refuse or terminate life-saving medical treatment can be distinguished from the right to active assistance in ending one's life, assisted suicide laws do not violate the Equal Protection Clause.[62]

In rejecting the claimants' arguments, the Court reaffirmed the State's strong interests in preserving life and protecting vulnerable people from harm, while clarifying that the individual's constitutional liberty interest in refusing unwanted medical treatment is qualitatively different from a right to assistance in committing suicide. The Court grounded its analysis of both issues in America's history and tradi-

55. *Id.* at n.10.
56. *Id.* at 93.
57. *Id.* at 94.
58. *Glucksberg*, 521 U.S. at 707–708.
59. *Id.* at 708.
60. Vacco v. Quill, 521 U.S. 793 (1997).
61. *Glucksberg*, 521 U.S. at 705–706.
62. *Vacco*, 521 U.S. at 796–797.

tion.[63] It explained that assisted suicide bans "are longstanding expressions of the States' commitment to the protection and preservation of human life,"[64] deeply rooted in 700 years of "Anglo-American common-law tradition."[65] While noting that suicide is no longer harshly punished,[66] it explained that the lessening of penalties for suicides had resulted, not from any acceptance of suicide, but from a "growing consensus" that harsh sanctions do not deter suicides and are unfair to the survivors.[67]

The Court noted that attitudes toward *assisted* suicide had not undergone a similar transformation. Although advancements in medical technology have prompted many states to reexamine their assisted suicide bans and enact Death with Dignity acts,[68] almost all states continue to criminalize assisted suicide.[69] Thus, in view of the "consistent and almost universal tradition that has long rejected [assisted suicide] ... and continues explicitly to reject it today," assisted suicide is not a fundamental liberty interest, and Washington's law does not violate the Fourteenth Amendment.[70] "To hold for respondents," the Court added, "we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[71]

In sum, after *Glucksberg* and *Vacco*, it is clear that states have a fundamental interest in protecting life, that suicide, though no longer a statutory crime, is still "unlawful" in a moral sense, and that there is a long-standing, Anglo-American tradition which disapproves of suicide and assisted suicide. In First Amendment jurisprudence, similar traditions determine whether speech is protected or wholly unprotected.[72]

63. *Glucksberg*, 521 U.S. at 710 ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."). In *Vacco*, handed down the same day, the Court did not engage in an extended historical analysis. Rather, Chief Justice Rehnquist, who wrote both opinions, incorporated the *Glucksberg* analysis by reference. *Vacco*, 521 U.S. at 796, n.1.

64. *Glucksberg*, 521 U.S. at 710.

65. *Id.* at 711.

66. *Id.* at 713.

67. *Id.*

68. *Id.* at 716.

69. *Id.*

70. *Id.* at 723.

71. *Id.*

72. In preparing the following overview of First Amendment law, the author referred to materials prepared by Professor Steven J. Heyman in 2009 (on file with the author) as well as the references cited below.

B. The First Amendment

1. Overview

The First Amendment provides that "Congress shall make no law... abridging the freedom of the speech."[73] It protects expressive conduct as well as spoken and written words,[74] and it covers political, social, artistic, literary, and other forms of speech. Although Justice Black considered this language "absolute,"[75] in practice, the Court has "consistently held" that it is subject to interpretation, and that the freedom of speech may be restrained "'for appropriate reasons.'"[76]

Scholars cite three major rationales underlying the Court's freedom of speech jurisprudence.[77] First, the search for truth is best "reached by free trade in ideas" rather than by repressing bad ideas.[78] Second, in a democracy, all citizens must be able to criticize the government and freely express their views, no matter how unpopular.[79] Third, government limitations on speech can "[stunt] people's lives, their abilities to define and express who they are," and "[impoverish] the national culture."[80]

First Amendment analysis distinguishes between content-based and content-neutral regulations, and employs a dizzying variety of tests to review them. A law which is enacted to regulate conduct that has an incidental impact on speech is considered content-neutral. A law which is enacted to regulate speech because of what it communicates is a content-based regulation.

Historically, the content of some speech was considered of such "low value" that it was outside the protection of the First Amendment.[81] Categories of unprotected speech included obscenity, libel,

73. U.S. CONST. amend. I.

74. Texas v. Johnson, 491 U.S. 397, 404 (1989).

75. GEOFFREY R. STONE, ET AL., THE FIRST AMENDMENT 3 (3d ed. 2008) (quoting Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960)).

76. *Id.*

77. *Id.* at 8-13.

78. *Id.* at 9 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting)). Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."

79. *Id.* at 11 (discussing the work of Alexander Meiklejohn: "'the vital point... is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. [Citizens] may not be barred [from speaking] because their views are thought to be false or dangerous.... When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger.'"). *See also* DANIEL A. FARBER, THE FIRST AMENDMENT 5 (2d ed. 2003).

80. FARBER, *supra* note 79, at 3-4.

81. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942).

true threats, fighting words and illegal advocacy.[82] However, in the past forty years the Court has adopted an extremely speech-protective stance, and now accords protection even to some "low value" speech.[83] As a result, the government is generally prohibited from discriminating against speech based on its content or the viewpoint expressed, with two exceptions.[84] First, the constitutionality of laws regulating low-value speech may be upheld under tests developed by the Court. Second, even speech which is normally accorded full First Amendment protection may be regulated if the government can demonstrate that the law is the least restrictive means of achieving a compelling state interest.[85]

In *Brandenburg v. Ohio*, the Court significantly increased protection for one category of low-value speech, illegal advocacy,[86] with far-reaching consequences. The *Brandenburg* test states that the government cannot "forbid or proscribe advocacy of the use of force or of law violation" unless it is "directed to initiating or producing imminent lawless action" and is likely to produce it.[87] *Brandenburg* concerned political advocacy—specifically, advocacy of violence against the government to effect political change. However, because the Court did not precisely define the limits of "advocacy," lower courts have since applied the *Brandenburg* test to a broad variety of cases where speech advocates, encourages, or aids and abets an unlawful action. Nevertheless, because the imminence prong of *Brandenburg* is difficult to satisfy outside the context of public, political speech, some courts have declined to apply it in other contexts.

In keeping with the Court's speech-protective stance, it has rarely acknowledged new categories of low-value speech. However, in 1982 it announced in *New York v. Ferber* that child pornography was unprotected as a category.[88] How does the Court decide that a certain category of speech is unprotected? Its statement in *Chaplinsky v. New Hampshire* gives some guidance. In *Chaplinsky*, the Court noted that

> the right of free speech is not absolute at all times and all circumstances. There are certain well-defined and narrowly limited classes

82. *Id.* at 572.

83. FARBER, *supra* note 79, at 1.

84. *Id.* at 21.

85. Burson v. Freeman, 504 U.S. 191, 210–211 (1992) (holding that law prohibiting political campaigning within 100 feet of polls did not violate First Amendment).

86. Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also infra* Part III.A.

87. *Brandenburg*, 395 U.S. at 447.

88. New York v. Ferber, 458 U.S. 747 (1982).

> of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[89]

Two things are notable about the Court's comment. First, it suggested that low-value speech represents a societal balancing act, a concept which has since been firmly rejected.[90] Second, in indicating that the regulation of low-value speech "ha[d] never been thought to raise any Constitutional problem,"[91] the Court implied that it was merely stating a principle long-since recognized at common law and by earlier courts.

The Court elaborated on both of these concepts in *United States v. Stevens*. In *Stevens*, the Court rejected the government's argument that the test for First Amendment protection "depends upon a categorical balancing of the value of the speech against its societal costs."[92] It explained that its previous references to a First Amendment balancing test were merely descriptive[93]; the decision in *Ferber* to ban pornographic images of children resulted, not from the slight social value of the speech itself, but from the direct harm suffered by the child and the state's compelling interest in preventing abuse.[94] Moreover, the Court said, its holding in *Ferber* was firmly grounded in "a previously recognized, long-established category of unprotected speech" that is "used as an integral part of conduct in violation of a valid criminal statute."[95] In concluding his discussion, Chief Justice Roberts indicated that the Court might yet identify new "categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[96] Thus, *Stevens* teaches that one of the defining characteristics of unprotected speech is its historically disfavored status.

89. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942).
90. *See* United States v. Stevens, 130 S. Ct. 1577, 1585–1586 (2010).
91. *Chaplinsky*, 315 U.S. at 571–572.
92. *Stevens*, 130 S. Ct. at 1585.
93. *Id.* at 1586.
94. *Id.*
95. *Id.*
96. *Id.*

2. Speech in Cyber Space

Speech in cyber space raises special concerns. The Court heard its first internet-related First Amendment case, *Reno v. American Civil Liberties Union*, in 1997.[97] In *Reno*, the Court struck down a federal statute intended to protect minors from obscene or indecent speech on the internet.[98] The Court held that although the government's interest was compelling, the challenged provisions of the Communications Decency Act (CDA) violated the First Amendment because they were overly broad, had a chilling effect on adult internet speech, and burdened an adult's right to receive legal information.[99] Because internet filtering and blocking software represented less restrictive alternatives, the CDA was unconstitutional.[100]

The Court analyzed the CDA under traditional First Amendment principles. It explained that the factors which had historically justified heavy regulation of the broadcast industry, such as a "scarcity of available frequencies" and "its 'invasive' nature," were not present on the internet.[101] The Court further explained that unlike radio or television, the internet is not "invasive" or intrusive.[102] Because users are required to seek out content, harmful material does not appear by accident.[103]

The Court did not have occasion to consider anonymous speech on the internet, which has changed the way people communicate with each other. Thus, it could not have anticipated the harm that can sometimes result from participation in extreme communities[104] or social networking sites such as MySpace. For example, in 2006, thirteen-year old Megan Meier committed suicide after being harassed by "a teenage mob" on MySpace.[105] An eighteen-year-old boy named Josh told Megan that "the world would be better off without her," and she apparently agreed.[106] Weeks later, her family learned that Josh was not a real boy but the fictional creation of Lori Drew, a neighbor who lived four hous-

97. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 844 (1997).
98. *Id.* at 849.
99. *Id.* at 875.
100. *Id.* at 877.
101. *Id.* at 868–869.
102. *Id.* at 869.
103. *Id.*
104. *See supra* Part I.
105. Sarah Jameson, Comment, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 231 (2008).
106. Betsy Taylor, *Missouri Prosecutor: Law Doesn't Allow for Charges in MySpace Teen Suicide Case*, ASSOCIATED PRESS, Dec. 4, 2007, *available at* WL 12/4/07 APWORLD 00:00:55.

es away.[107] Because Megan and Drew's daughter Sarah were no longer friends, Drew allegedly wanted to find out what Megan was saying about Sarah.[108] No federal internet law explicitly prohibited Drew's alleged behavior, and because it did not rise to the level of stalking or harassment in Missouri, no criminal charges were filed.[109] It is doubtful that an adult woman would have engaged in such speech if her identity had been known to the minor and the minor's family.

In sum, the Court's decision in *Reno* and the cautionary tale of Megan Meier together illustrate the difficulties of regulating harmful speech on the internet. In *Reno*, the Court clearly stated that the government cannot totally ban speech on the internet that is lawful for adults, even where the government has a compelling interest in preventing harm to vulnerable minors. Moreover, because cyber bullying is a new phenomenon, there were no laws under which Lori Drew could properly be charged. In contrast, it may be possible to apply existing assisted suicide laws like Minnesota's to prohibit online speech which assists or encourages people to commit suicide.

III. ANALYSIS

This analysis will focus on two kinds of suicide-related cyber speech—speech which assists or "teaches" suicide by providing detailed information on suicide methods, and speech which encourages suicide. Although the analysis is not state-specific, it uses Minnesota's assisted suicide law—which punishes anyone who aids a suicide by "intentionally advis[ing], encourag[ing], or assist[ing] another in taking the other's own life"[110]—as a model for a hypothetical assisted suicide statute in the State of X.[111] The analysis also assumes that State X has decriminalized suicide.

107. Matthew C. Ruedy, Comment, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & Tech. 323, 324 (2008).

108. Taylor, *supra* note 106.

109. *Id.*

110. Minn. Stat. § 609.215 (2011). The *Melchert-Dinkel* Court has construed this statute to require imminence. State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 32–33 (D. Minn. Mar. 15, 2011).The State X statute has not been similarly narrowed.

111. It should be noted that in some states, laws prohibit "aiding" suicide, while in other states, laws prohibit "assisting," "soliciting," or "encouraging" suicide. Minnesota defines aiding suicide to encompass advising, encouraging or assisting a person to commit suicide. At least six states define assistance to require "providing the physical means" or participating in the "physical act." Wayne R. LaFave, 2 SUBSTANTIVE CRIMINAL LAW § 15.6 , n.29 (2d ed 2010). Thus, this analysis would not apply in states which require physical assistance of some sort.

Part III.A explores the parallels between speech which assists suicide and speech which aids and abets crimes. It concludes that speech which is an integral part of a criminal action is not protected, and that because a state can constitutionally outlaw assisting suicide, it can do so whether the assistance comes in the form of speech or conduct. Part III.B first considers what issues arise if speech which encourages suicide is analyzed under the *Brandenburg* test. Next, it argues that *Brandenburg* is not the appropriate standard for analyzing speech which encourages suicide. It then argues that under *United States v. Stevens*, speech which encourages suicide is a traditional, unprotected category of speech. Finally, it argues that even if speech which encourages suicide is not a category of unprotected speech, an assisted suicide statute as applied to cyber speech should be upheld under strict scrutiny because of the state's compelling interests in preserving life, preventing suicide, and protecting vulnerable persons from abuse.

It should be noted that this analysis does not consider the First Amendment doctrines of overbreadth or vagueness.[112] In addition, it does not consider ideological discussions related to suicide—such as whether suicide is a rational choice in response to life's problems—because it assumes they are protected speech under the First Amendment.

A. Speech Which Assists or "Teaches" Suicide

Suppose that A, who lives in State X, responds to a forum posting by B, who indicates that she is suicidal, wants a quick and painless death, and asks for advice and information. A sends B an email "advis[ing] her to use morphine for a painless death, [explaining] how to falsify a prescription to buy the drug, the dose needed, and how to find a secluded place to avoid someone trying to save her."[113] B follows A's instructions, successfully purchases the correct dose of morphine, and completes suicide in a secluded place.[114] Without the information in A's email, B would have not have known what dose to use, or how to successfully falsify the morphine prescription. Therefore, A has aided

112. The *Melchert-Dinkel* Court ruled that Minnesota's assisted suicide statute is not unconstitutionally vague as applied to internet speech, because the language is clear and unambiguous, and an ordinary person would know what conduct it prohibits. Omnibus Order & Memorandum, *Melchert-Dinkel*, No. 66-CR-10-1193, at 15.

113. These facts are taken from a French case. *See Prison Sought in French Internet Suicide Case*, AGENCE FRANCE PRESSE ENGLISH WIRE, *available at* 9/23/08 AGFRP 03:00:00 (Sept. 23, 2008) (Westlaw).

114. *Id.*

B's suicide by assisting, or "teaching" her how to commit suicide by falsifying a prescription and buying the correct dose of morphine.

If A is charged with assisting suicide in connection with B's death, he will probably argue that his expression is protected by the First Amendment. Specifically, A is likely to argue that assisting suicide is a form of encouragement, or advocacy, and that he cannot be held responsible for B's suicide unless all elements of the *Brandenburg* test for illegal advocacy are met.[115] However, this is not the case.

Every court which has considered the question of a defendant's criminal liability for aiding others in the commission of a crime has concluded that the defendant's speech is not categorically protected by the First Amendment.[116] These courts have found *Brandenburg* inapplicable where the speech itself constitutes the aiding and abetting—that is, where it is "simply means to get a crime successfully committed."[117]

Justice Black first outlined the contours of this "speech-act doctrine" in *Giboney v. Empire Storage & Ice Co.*[118] In *Giboney*, the Court considered whether the First Amendment protected "peaceful" picketing by a labor union, which was trying to force an ice manufacturer to stop selling ice to non-union peddlers.[119] The ice manufacturer, Empire, charged that the union's actions violated Missouri's restraint of trade laws.[120] The union argued that because it was merely trying to publicize true facts about the labor dispute, its picketing was protected expression under the First Amendment.[121] The Court disagreed, finding that the union's speech was part of "a single and integrated course of conduct" aimed at violating Missouri's valid law, and holding that the First Amendment does not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute."[122] The Court added that if speech incidental to illegal conduct was protected, the government would find it impossible to punish many of "the most

115. *See infra* Part III.B.
116. Rice v. Paladin Enters. Inc., 128 F.3d 233, 244 (4th Cir. 1997).
117. *Id.*
118. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).
119. *Id.* at 491–492.
120. *Id.* at 493.
121. *Id.* at 497–498.
122. *Id.* at 498.

pernicious criminal acts and civil wrongs,"[123] such as solicitation, threats, bribery, perjury, harassment and forgery.[124]

The Court has affirmed the principle set forth in *Giboney* many times,[125] and lower courts have applied it in a variety of criminal aiding and abetting cases.[126] Where defendants have been charged with aiding and abetting a crime through speech or writing, these courts have distinguished *Brandenburg*, holding that the defendant's speech is not categorically protected by the First Amendment.[127]

For example, in *United States v. Buttorff*, the defendants were charged with aiding and abetting tax fraud by conducting public seminars where they encouraged others to file fraudulent tax returns and avoid paying taxes.[128] The Eighth Circuit held that the First Amendment did not automatically bar prosecution because

> [a]lthough the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law.[129]

The court reached this conclusion despite the apparent ideological basis for the defendants' speeches.[130] Moreover, although the defendants were not personally involved in preparing any false returns (and in fact, did not even know whether any false returns had been filed), people had testified to preparing false tax returns as a result of attending the meetings.[131]

In *United States v. Barnett*, the Ninth Circuit relied on *Buttorff* in holding that the First Amendment did not shield Barnett from liability for aiding and abetting illegal drug manufacture.[132] In *Barnett*, police searching the home of Hensley, who operated a PCP factory, found material Hensley had ordered by mail from Barnett, including instructions for the "Synthesis of PCP—Preparation of Angel Dust" and information on where to buy necessary ingredients.[133] When police later

123. Rice v. Paladin Enters. Inc., 128 F.3d 233, 244 (4th Cir. 1997).

124. *Id.* at 243–44 (citations omitted).

125. *See id.*

126. *Id.* at 244–246.

127. *Id.*

128. United States v. Buttorff, 572 F.2d 619, 622 (8th Cir. 1978).

129. *Id.* at 624.

130. *Id.* at 622 (noting testimony recalling that defendants' speeches dealt mainly with "the Constitution, the Bible, and the unconstitutionality of the graduated income tax.").

131. *Id.* at 623.

132. United States v. Barnett, 667 F.2d 835, 842–843 (9th Cir. 1982).

133. *Id.* at 838.

searched Barnett's home, they found documents for his mail-order business, which consisted of supplying instructions for manufacturing illegal drugs and information on where to buy the raw materials.[134] Barnett's sole contact with Hensley was through the mail, and he argued that the warrant failed to state facts sufficient to connect him to the illegal conduct. However, the court disagreed, finding sufficient evidence to sustain a charge of aiding and abetting the manufacture of illegal drugs.[135] It rejected Barnett's claim that the seized items—printed instructions for making illegal drugs—were protected by the First Amendment simply because they consisted of printed words,[136] and noted that if someone aids and abets a crime that is later carried out, it is irrelevant how much time elapses from the time the principal receives the instructions or advice and the time she actually commits the crime.[137]

At least one court has extended the speech-act doctrine to a civil case. In *Rice v. Paladin*, the Fourth Circuit relied heavily on *Barnett* in holding that the First Amendment did not shield Paladin, the publisher of the book *Hit Man,* from civil liability for aiding and abetting murder.[138] *Rice*, a wrongful death suit brought against Paladin, alleged that James Perry had committed three brutal murders by closely following *Hit Man*'s explicit instructions for becoming "a professional killer."[139] For the purposes of the summary judgment motion, Paladin stipulated that in marketing *Hit Man*, it had targeted would-be killers; that it had known and intended that the book's explicit instructions for becoming "a professional killer" would immediately aid and abet murderers; and that it had aided and abetted Perry in committing three murders.[140]

Since the facts stipulated to by Paladin were sufficient as a matter of law to establish its liability, the sole issue before the court was whether the First Amendment was an absolute bar to imposing that liability.[141] The district court, applying *Brandenburg*, granted Paladin's summary judgment motion, and held that *Hit Man* was protected speech under the First Amendment.[142] The Fourth Circuit reversed.

134. *Id.* at 840.

135. *Id.* at 841.

136. *Id.* at 842. ("The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.").

137. *Id.* at 841.

138. Rice v. Paladin Enters. Inc., 128 F.3d 233, 242-243 (4th Cir. 1997).

139. *Id.* at 241. Perry had already been convicted of the murders in a criminal trial.

140. *Id.*

141. *Id.*

142. *Id.* at 250.

Judge Luttig acknowledged the importance of the freedoms protected by *Brandenburg*.[143] However, he rejected the application of *Brandenburg* to the case before him, reasoning that where the defendant intentionally aided and abetted murder for commercial gain, those freedoms were not implicated.[144]

Because Justice Luttig found *Barnett* "indistinguishable in principle" from the case before him, he chose to rely primarily on criminal aiding and abetting law in his analysis, reasoning that the principles were equally applicable to civil cases.[145] Like Barnett, Paladin's only contact with the criminal occurred when it responded to his order and payment by mailing printed material. However, this material consisted of detailed, highly specific written instructions which assisted or "taught" the criminal how to commit the particular crime. If the First Amendment did not bar punishment of Barnett's speech-act in a criminal case, Judge Luttig concluded that there was no reason why it could not be applied in a civil context.[146]

Judge Luttig also noted that consistent with the position of these courts, the Department of Justice had advised Congress that *Brandenburg*, and the "imminence requirement in particular," was not applicable to criminal aiding and abetting, because an aiding and abetting charge is not directed to advocacy of criminal conduct, "but on defendants' successful efforts to assist others by" instructing them in committing a crime.[147] Thus, Justice Luttig concluded that the First Amendment was not an absolute bar to Paladin's liability for the wrongful death suit.[148]

In sum, *Giboney* and the cases that rely on it teach that the First Amendment does not bar enforcement of valid criminal laws simply because speech might somehow be implicated, and that courts considering aiding and abetting cases involving speech may properly analyze them under the principles announced in *Giboney* rather than applying the *Brandenburg* test. Moreover, several courts have concluded that a lack of personal contact or a gap in time from receipt of instructions to

143. *Id.* at 243.

144. *Id.* at 242–243.

145. *Id.* at 244–247 (discussing the speech-act doctrine in criminal aiding and abetting cases, and concluding that if the First Amendment does not bar liability for speech acts in criminal cases, there is no reason not to extend the principle to civil cases).

146. *Id.* at 247–248. The court did note that a heightened intent requirement might apply in civil cases, but felt that it would be met on the facts before it. *Id.*

147. *Id.* at 246 (quoting DEP'T OF JUSTICE 1997 REP. ON THE AVAILABILITY OF BOMBMAKING INFO., at 37 (Apr. 1997)).

148. *Id.* at 243.

the commission of the crime does not invalidate a charge of aiding and abetting.

A would probably argue that speech which assists suicide is distinguishable from speech which aids and abets criminal actions for one critical reason: suicide is not an illegal action in State X. Because suicide is not illegal, an aiding and abetting analysis should not apply, and punishment of A's speech should be foreclosed by the First Amendment.

In this case, A would be wrong because he aided and abetted B in falsifying a prescription for a controlled substance, which is surely unlawful. Therefore, A would probably be charged with aiding and abetting B's illegal drug purchase, and A's action would fall squarely within the bounds of aiding and abetting cases as exemplified by *Barnett*. Since the end result of B's illegal action was B's suicide, A's speech would not be protected by the First Amendment.

Now assume instead that A sends B an email with very detailed instructions on how to successfully hang herself. Specifically, A's email details the exact kind of rope B should buy, exactly how to tie the knot, and exactly where B should place the rope around her neck to assure that she dies quickly and with the least possible discomfort.

Since completing suicide via hanging is not illegal, A's speech does not fall within the aiding and abetting category exemplified by *Barnett*. However, A's contention that his speech is protected can be addressed in two different ways. First, a court might consider that suicide, though no longer a statutory crime, is still considered "wrongful" in Western society.[149] Suicide was not decriminalized because the practice of killing oneself became acceptable, but out of respect for the suicide's family.[150] If suicide were not still in some way "wrongful," assisted suicide would not be criminalized. Therefore, a court might find that suicide is a morally wrong, "quasi-unlawful" act, and an aiding and abetting analysis could properly be applied, with the result that A's speech would not be protected by the First Amendment.

A court unwilling to stretch the concept of an unlawful act to encompass suicide as a wrongful, quasi-unlawful act, could instead consider that although the principle announced in *Giboney* has been *applied* to cases of aiding and abetting criminal actions, it is not *limited* to cases of criminal aiding and abetting. In fact, there is nothing in

149. *See supra* note 49.

150. Washington v. Glucksberg, 521 U.S. 702, 713 (1997).

Giboney which requires one person's speech to aid and abet another person in completing an illegal action. *Giboney* simply says that speech which is an integral part of criminal conduct is not protected. Thus, if a state has enacted a valid criminal law of general applicability, it can punish violations of that law whether the violation occurs as conduct or speech.

Since the Supreme Court upheld the constitutionality of assisted suicide laws in *Glucksberg*,[151] State X can apply the principle set forth in *Giboney* and validly punish speech which assists suicide of a specific person, in violation of its valid statute. By sending B detailed instructions on how to hang herself, A has intentionally assisted or "taught" B, a specific person, to commit suicide. Since B has completed suicide, the requirements of State X's statute are fulfilled, and A's speech will fall outside the protection of the First Amendment.

Assume, however, that A is a web master for a pro-suicide web site, and that he has written and posted a file with very detailed instructions on completing various methods of suicide, including hanging. There is no accompanying material advocating the right to choose suicide. B accesses A's "how to hang yourself" instructions and completes suicide using the method A describes. The computer in the room where B is found is still on, with A's instructions still on the screen.[152] Whether A's speech is protected will turn on whether he has violated the assisted suicide statute.

Both *Barnett* and *Buttorff* endorse the notion that if A intends the instructions to be used to complete suicide, it is irrelevant how long B waits after reading the material before she completes suicide. Further, it is not important if A has had much personal contact with B, and it does not even matter if A knows whether B has successfully completed suicide. However, State X's statute requires A to assist a specific person, B, in successfully completing suicide. Under these facts, it is doubtful that A would be found to have violated State X's statute, because while A may intend that the instructions be used to complete suicide, he probably does not intend that B, specifically, use them. Therefore, in this scenario, A's speech is most likely protected by the First Amendment.

In sum, in interactive situations (such as an email, chat, text message, or forum posting), where A provides B with specific suicide in-

151. *See supra* Part II.A.

152. These facts are taken from a Florida case. *See* Rebecca Sinderbrand, *Point, Click and Die*, NEWSWEEK (U.S. Ed.), June 30, 2003, (Nat. Affairs), at 28, *available at* LEXIS.

structions, which B then uses to complete suicide, A's speech is almost certainly unprotected under the First Amendment. However, if B accesses A's instructions through a non-interactive format such as a methods file posted on a web site, A will most likely escape any charges under an assisted suicide statute which requires intent to aid a specific person in committing suicide.

B. Speech Which Encourages Suicide

Whether a state can punish cyber speech which merely encourages suicide is less clear. First, because encouragement is a form of advocacy, many courts will apply the *Brandenburg* test, and as set forth below, under a strict application of *Brandenburg*, an assisted suicide statute would almost certainly be held unconstitutional as applied to cyber speech. Second, "encouragement" is a broad and somewhat amorphous concept. While it is clear that the statement "I think you should kill yourself," is a direct encouragement to suicide, encouragement may also be indirect, or discernible only through a pattern of repeated statements. For example, a suicidal person who is repeatedly told that "suicide is the only way to end your pain," or "I don't know why you're still alive," may eventually take those statements as encouragement to commit suicide.

Charges for encouraging suicide through speech are extremely rare and convictions are almost non-existent. However, in a 1984 incident, a California man was charged with encouraging suicide for yelling "Jump!" to a woman who was about to leap from a water tank.[153] Similarly, in 1990, a Canadian man was charged with aiding suicide for encouraging a patron in a bar to shoot himself.[154] It is un-

153. *Around the Nation: Man is Held for Telling Student on Tank to Jump*, N.Y. TIMES, Dec. 8, 1984.

154. *Man Charged with Aiding Suicide*, GLOBE & MAIL (Toronto), July 16, 1990, at A7, *available at* WLNR 4557115. For other cases, *see China Scene: East*, CHINA DAILY, *available at* 2009 WLNR 4303799 (Mar. 3, 2009) (Chinese man arrested for encouraging man to jump from roof); *Teenagers in German Town Urge Woman Threatening Suicide to Jump*, IRISH TIMES, Nov. 8, 2006, *available at* 2006 WLNR 19343148; *Trial Delayed for Montreal Dad Charged With Pushing Kids to Commit Suicide*, CANADIAN PRESS, Oct. 24, 2006, 10/24/06 AP Alert-Crime 02:23:07, *available at* WESTLAW; Thom Mrozek, *Defendant in Assisted-Suicide Trial Knew of Victim's Past*, LOS ANGELES TIMES, May 27, 1994, *available at* 1994 WLNR 4169359 (California man who knew roommate had made previous suicide attempt on trial for assisted suicide for handing roommate shotgun and telling him "Just do it."); Inga Saffron, *Bar Bet Was After Hours*, PHILADELPHIA INQUIRER, Dec. 24, 1986, http://articles.philly.com/1986-12-24/news/26071465_1_bet-john-williamson-bar (officials considering assisted suicide or manslaughter charges against bar patrons and employees after $70 bet led bar manager to drink himself to death); *Teen-ager Sentenced on Charge of Aiding in Suicide*, ASSOCIATED PRESS, Jan. 7, 1985, 1/7/85 AP Online 00:00:00, *available at* WESTLAW

known whether either case resulted in a conviction. However, in 2002, a Welsh teenager was convicted of encouraging his girlfriend to commit suicide by jumping from a cliff.[155] According to the girl, who survived her attempted suicide, the boy told her that "my life was crap and he didn't know why I was still alive. *He was just going on and digging at me*—telling me he wanted me to be free."[156] He also encouraged her to jump off the bridge so that she could join the friend who had previously died there.[157] In contrast, no charges were brought in two sensational cases where people watched suicides broadcast live on the internet—and encouraged the suicidal people to go through with the acts.[158]

Now assume that A, who lives in State X and knows B is suicidal, sends B several emails over the period of a few days, encouraging her to jump from the bridge near her house, and assuring her that suicide is the only way to end her pain. Assume that the day after B receives A's last email, she reads it again and, leaving it up on her computer screen, goes to the bridge and jumps, successfully completing suicide. In this scenario, A will argue that he cannot be held responsible for B's death unless all elements of the *Brandenburg* test are met.

1. Illegal Advocacy

In *Brandenburg v. Ohio*,[159] the Court overturned the conviction of a Ku Klux Klan leader for violating Ohio's criminal syndicalism statute, holding that a state cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[160] Brandenburg was convicted of advocating the

(teenager who helped classmate prepare suicide note sentenced to year of probation and $2500 fine after pleading no contest).

155. Tania Branigan, *Schoolboy Guilty of Trying to Get Girlfriend to Commit Suicide*, GUARDIAN (U.K.), June 29, 2002, *available at* http://www.guardian.co.uk/uk/2002/jun/29/taniabranigan/print.

156. Tania Branigan, *Suicide Case Boy 'Thrilled by Death,'* GUARDIAN (U.K.), June 18, 2002, *available at* 2002 WLNR 15228303. (emphasis added). She also remembers him "pushing her towards the edge of the cliff." *Id.*

157. *Id.*

158. *See* Jonathan Abel, *As Teen Died, They Just Watched. How?* ST. PETERSBURG TIMES, Nov. 29, 2008, at 1B, *available at* 2008 WLNR 22999461; Steven Wright, David Wilkes, & Beth Hale, *Chatroom Users 'Egged on Father to Kill Himself Live on Webcam,'* MAIL ONLINE, last updated Mar. 23, 2007, http://www.dailymail.co.uk/news/article-444182/Chatroom-users-egged-father-kill-live-webcam.html."

159. Brandenburg v. Ohio, 395 U.S. 444 (1969).

160. *Id.* at 447–448.

use of violence against the government at a Klan rally for stating that if the government "continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[161] The Court criticized the Ohio statute for punishing the "mere advocacy" of violence or the "teaching" of criminal syndicalism to achieve political reform, as distinguished from advocacy that incites "imminent lawless action."[162] It explained that while "preparing a group for violent action and steeling it to such action" can lawfully be punished, "the mere abstract teaching... [of the] moral necessity for a resort to force and violence" cannot.[163]

Because of the Court's failure to narrowly define the scope of "advocacy," lower courts have since applied the principle announced in *Brandenburg* to facts far removed from political advocacy.[164]

In the scenario set forth above, A has encouraged B via email to commit suicide by jumping off a bridge. The first prong of *Brandenburg* requires that the speaker advocate "the use of force or of law violation." While it is possible that A could encourage someone to commit suicide using a violent method (say shooting) or an unlawful method (say purchase and use of a controlled substance), here A has encouraged B to jump off a bridge, a method which is arguably neither violent nor unlawful. Similarly, if A encourages B to commit suicide without recommending a particular method, no matter how persistently or persuasively, A would not be liable for B's suicide, because suicide itself is not a "law violation" anywhere in the United States.[165] However, although suicide is no longer criminal, it is still disfavored and "wrongful." This presents a dilemma. The act of encouraging a suicide is illegal, yet if the encouragement takes the form of speech, it is not illegal under *Brandenburg*. This is a wrong result, because it is inconsistent with the intent of the law.

161. *Id.* at 446.

162. *Id.* at 448–449.

163. *Id.* at 448 (citing Noto v. United States., 367 U.S. 290 (1961)).

164. *See, e.g.,* Entertainment Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006) (granting preliminary injunction barring enforcement of a statute criminalizing distribution of video and computer games that appeal to minors' morbid interest in violence, on grounds that they are protected expression under *Brandenburg*); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (applying *Brandenburg* and holding that magazine article did not incite adolescent to perform act that led to death by hanging); *but see* Rice v. Paladin Enters. Inc., 128 F.3d 233 (4th Cir. 1997) (declining to apply *Brandenburg* and holding that book *Hitman* was a criminal instruction manual not protected by First Amendment).

165. *See supra* Section III.A.

As set forth in Part III.A, courts could relax the "illegal action" prong so that it includes the "quasi-unlawful" act of suicide. This would not be a great stretch. Suicide has been disfavored in western culture for more than 700 years, and has been illegal for much of that time. The fact that it is no longer illegal reflects a policy decision—that criminalizing suicide will not effectively deter it, and will only burden the suicide's family. If suicide were not still in some way "wrongful," assisted suicide would not be criminalized. Therefore, modifying *Brandenburg* to allow the "quasi-unlawful" action of suicide to fulfill the unlawful action requirement would be consistent with the historical understanding of suicide as a crime, even though suicide today is no longer criminalized.

However, even assuming the problem of "unlawful" action is overcome, a problem with the imminence requirement will remain. A's advocacy must be "directed to initiating or producing imminent lawless action." To "direct" in this sense means to "cause (someone or something) to move on a particular course."[166] Thus, A's speech must encourage B to commit suicide "imminently."[167] The *Brandenburg* Court gave no guidance on what qualifies as "imminent" action. However, in a later case the Court narrowed the time frame considerably,[168] and Kent Greenawalt calculates that "imminence" cannot be more than a few hours.[169] Thus, under the second prong of *Brandenburg*, by sending B an email, A must intend to encourage B to commit suicide within a few hours, at most. While it is possible that this might occur in some situations, under the facts assumed here it is not clear that A has a specific time frame in mind. A further complication is that while speech in a chat room is in real time, the recipient of an email may not read it immediately—possibly not for days. This could potentially invalidate even a clear attempt to encourage a specific person to commit suicide quickly. As discussed more fully in Section III.B.2, below, while an "imminence" requirement makes absolute sense if the Court's goal is to allow political speech the maximum latitude possible

166. BLACK'S LAW DICTIONARY 491 (8th ed. 2004).

167. According to BLACK'S, an imminent danger is "an immediate, real threat to one's safety that justifies the use of force in self-defense." *Id.* at 421. It does not define "imminent" separately. The SHORTER OXFORD ENGLISH DICTIONARY 1331 (6th ed. 2007) defines "imminent" as "impending, soon to happen."

168. Hess v. Indiana, 414 U.S. 105, 108–109 (1973) (reversing the disorderly-conduct conviction of a demonstrator who yelled, "We'll take the fucking street later.").

169. KENT GREENAWALT, SPEECH, CRIME, & THE USES OF LANGUAGE 209 (1989).

before restraining it through criminal sanctions, it means little in the context of a private email which advocates suicide.

Finally, under the third and final prong of *Brandenburg,* A's encouragement must be "likely to incite" B's suicide. How is this to be judged? Because there is really no objective standard, a court would have to determine it on a case-by-case basis. Thus, while some encouragements might satisfy this prong, it is clear that many of them probably would not. On the facts assumed here, it is arguable that A's emails, taken as a whole, would be likely to encourage B, as a suicidal person, to commit suicide.

Now assume that A, the webmaster of a pro-suicide forum, has written and posted content on the site which encourages suicide. If *Brandenburg* is strictly applied, it would be nearly impossible for the State X statute to survive all three prongs of the test. In addition, A's posting would probably not meet the requirements of the statute itself. First, the statute requires intent to aid a specific person in taking her life, and *Brandenburg* requires that the encouragement be directed to encouraging unlawful action. Neither of these requirements is likely to be satisfied by A's general statement, posted on a web site, encouraging suicide. Second, if A posts content encouraging suicide on his web site, he is likely to do so in the context of advocating for a specific cause. For example, A's web site might encourage terminally ill persons in great pain to end their lives rather than continuing to suffer. This kind of speech would fall into the category of abstract advocacy, which is protected under *Brandenburg.* Third, even if B reads A's web page and immediately commits suicide, the timing and the connection would be difficult to prove. Fourth, as previously discussed, a court would have to be persuaded to modify the unlawful act requirement to include the "quasi-illegal" act of suicide. Finally, A's encouraging web page must be likely to cause suicide imminently. While it might be possible to show that B, for example, actually committed suicide within a very short time after reading A's web page, the test requires that A's encouragement be *likely* to cause suicide. Without a statistical study, likelihood would be difficult to prove at best.

In sum, it is clear that if *Brandenburg* is strictly applied, only a very small percentage of cyber suicide encouragements, if any, would survive the analysis. Under *Brandenburg,* application of an assisted suicide statute to cyber speech encouraging suicide is likely to be held unconstitutional. However, there is a strong argument to be made that

Brandenburg should not apply to non-ideological speech like the private emails between A and B.

2. Brandenburg Should Not Be Applied to Cyber Suicide Speech

Kent Greenawalt believes that "the values and dangers of encouragements to criminal behavior depend greatly on the context in which they are uttered and on the reasons given to support them."[170] He contends that a stringent test such as the one set forth in *Brandenburg* appropriately protects public, ideological speech which encourages specific crimes, because the First Amendment value of such speech is high.[171] As Justice Luttig noted in *Rice*, the "right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty.... Without the freedom to criticize that which constrains, there is no freedom at all."[172] Thus, public, ideological speech implicates one of the fundamental rationales for protecting freedom of expression—the right to self-governance.[173] Moreover, unless the speaker is inciting the imminent commission of a crime, the listener will most likely have the opportunity to listen to opposing points of view and form her own opinion on the course of action being advocated.

In contrast, Greenawalt believes that there is little reason to protect private, non-ideological encouragements to crime.[174] For example, if A privately encourages B to kill C, the communication has little expressive value, especially when weighed against the danger to C.[175] Moreover, since B is unlikely to discuss what A has said to anyone else, there will probably be no counter-speech which could influence B's thinking.[176] Since the opportunity for counter-speech is virtually nil, the rationale for the *Brandenburg* imminence requirement becomes essentially meaningless.[177] Therefore, Greenawalt suggests that a more appropriate way to evaluate whether a private, non-ideological encouragement to crime should be protected is simply to determine whether A actually intended to encourage B in the commission of a crime, and if so, whether he has effectively communicated that to B.[178]

170. *Id.* at 260.
171. *Id.* at 266.
172. Rice v. Paladin Enters. Inc., 128 F.3d 233, 243 (4th Cir. 1997).
173. *See supra* note 79 and accompanying text.
174. GREENAWALT, *supra* note 169, at 261.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 262.

Although Greenawalt's analysis is confined to private speech which encourages the commission of a crime, it can appropriately be applied to private speech in which A encourages B to commit suicide through a series of emails. Although suicide is no longer illegal, it is still morally disfavored, and A is engaging in a criminal action by counseling suicide. Counseling suicide does not implicate one of the core First Amendment rationales any more than counseling murder does. Thus, the expressive value of A's communication urging B to commit suicide is no greater than it would be if A were urging B to commit murder. Similarly, the danger to B is great, especially in view of the fact that she may feel incapable of or unwilling to discuss the idea of committing suicide with anyone else. Moreover, even if B does discuss the idea of committing suicide with someone else, she may be too fragile, vulnerable or depressed for counter-speech to impact her thoughts or feelings. Thus, there would be no reason to impose an imminence requirement on A's communication to B.

Under Greenawalt's standard for private non-ideological speech, as long as A's emails to B demonstrate a clear intention to encourage B to commit suicide, A's speech would not be protected under the First Amendment. Therefore, A could be held liable under an assisted suicide statute such as State X's, consistent with the legislature's intent. Since the State X statute requires A to intentionally encourage B to commit suicide, Greenawalt's test is also consistent with the statutory requirements set forth by the state. In contrast, as demonstrated above, strict application of the *Brandenburg* test to speech which encourages suicide would fail, thwarting the legislature's intent to punish assisted suicide.

Another approach courts might take to evaluating speech which encourages suicide is to consider whether it is a new category of unprotected speech.

3. United States v. Stevens: Historically Unprotected Speech

In *United States v. Stevens*, Chief Justice Roberts intimated that if the Court were ever to recognize a new category of unprotected speech, it would be one which had been "historically unprotected, but [which had] not yet been specifically identified" as such by the Court.[179] In *Stevens*, the Court considered whether a federal statute criminalizing the commercial creation, distribution, or possession of

179. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).

certain depictions of animal cruelty was facially invalid under the First Amendment.[180] Although Congress had enacted the statute to prohibit "crush" videos, which showed small animals being tortured and killed to satisfy a specific sexual fetish,[181] Stevens had been convicted for distributing videos of dogfights.[182]

On appeal, the Third Circuit vacated Stevens' conviction and struck down the statute, holding that it could not survive strict scrutiny.[183] The Supreme Court affirmed on the grounds that the statute was substantially overbroad, and thus invalid under the First Amendment.[184] The government argued that depictions of animal torture should be recognized as a new category of unprotected speech because they had little or no redeeming value.[185] It proposed to evaluate whether speech should be categorically unprotected by balancing "the value of the speech against its societal costs."[186] The Court rejected the government's "startling and dangerous" proposal for evaluating unprotected speech in the strongest possible terms,[187] explaining that whenever "we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis."[188] Rather, when determining that speech is categorically unprotected, the Court "ground[s] its analysis in a previously recognized, long-established category of unprotected speech," that is, speech which is "used as an integral part of conduct in violation of a valid criminal statute."[189] Thus, if speech which encourages suicide is to become a new category of unprotected speech under the First Amendment, it must fall into a category of speech which has historically been recognized as unprotected.

As the Court acknowledged in *Glucksberg*, assisted suicide has been illegal for more than 700 years, and suicide itself was once considered "an Offence against Nature, against God, and against the King."[190] However, *Stevens* teaches that even if assisted suicide has historically been prohibited, this alone is not enough to warrant a new

180. *Id.* at 1582.
181. *Id.*
182. *Id.* at 1583.
183. *Id.* at 1584.
184. *Id.* at 1592.
185. *Id.* at 1584.
186. *Id.* at 1585.
187. *Id.*
188. *Id.* at 1586.
189. *Id.*
190. Washington v. Glucksberg, 521 U.S. 702, 712, n.10 (1997).

category of speech. Rather, the speech itself must also have been traditionally unprotected. As an example, the *Stevens* Court acknowledged that animal cruelty had historically been prohibited.[191] However, because there was no evidence that *depictions* of animal cruelty were historically unprotected, the Court declined to recognize depictions of animal cruelty as a new category of speech.[192]

At common law, suicide was a grievous wrong which "by [] example and evil [] threaten[ed] and endanger[ed] the subversion of all civil society."[193] Life was a gift from God, who alone had the power to destroy it. Thus, a person who committed suicide was guilty of self-murder, "a double offense"—one against God, and the other "against the king, who [had] an interest in the preservation of all his subjects."[194] As a result, suicide was ranked "among the highest crimes . . . [as] a peculiar species of felony."[195] At common law it was unlawful to "counsel and solicit another to commit a felony or other aggravated offense," even if the crime was not committed.[196] Today, counseling or soliciting a felony is still recognized as a substantive crime by most courts.[197]

Because suicide was historically a felony, one who advised or counseled another to commit suicide was traditionally committing a substantive crime. Although suicide is no longer a felony, it continues to be "wrongful." Because suicide, though no longer illegal, is still highly disfavored in our society, it is fair to class speech counseling or encouraging suicide with speech counseling a felony—as a traditionally unprotected category of speech.

Since both assisted suicide and speech which counsels suicide have been traditionally unlawful, based on the criteria laid out by Chief Justice Roberts in *Stevens*, there is a strong possibility that the Court would consider identifying speech which counsels suicide as categorically unprotected under the First Amendment.

191. *Stevens*, 130 S. Ct. at 1585.

192. *Id.*

193. 4 WILLIAM BLACKSTONE, COMMENTARIES *176, *176.

194. *Id.* at *189.

195. *Id.*

196. United States v. De Bolt, 253 F. 78, 81 (S.D. Ohio 1918).

197. *Construction & Effect of Statutes Making Solicitation to Commit a Crime a Substantive Offense*, 51 A.L.R.2d 953 § 2(a).

4. Strict Scrutiny

An assisted suicide statute as applied to cyber suicide speech has a good chance of being upheld under strict scrutiny. In order to survive strict scrutiny, the government must show that a content-based regulation is narrowly tailored to achieve a compelling government interest.[198] For example, in *Burson v. Freeman*, a plurality of the Court upupheld a Tennessee statute which prohibited campaigning within 100 feet of a polling place.[199] The challenger, a politician, asserted that it limited her ability to communicate with voters.[200] The state argued that the statute advanced its compelling interests in "protecting the rights of its citizens to vote freely" and ensuring the integrity of its election process.[201] The plurality agreed that the state's interests were compelling.[202] In addition, after a historical review of election proceedings, it concluded that "restricted areas in or around polling places" were necessary.[203]

For an assisted suicide statute to withstand strict scrutiny, the state's interests in preserving life, preventing suicide and protecting abuse of vulnerable persons must be "compelling." Because neither *Glucksberg* nor *Cruzan* was decided under strict scrutiny, the Court did not use the word "compelling" in describing the state interests asserted in these cases. Nevertheless, in considering whether Missouri had a right to require clear and convincing evidence of Cruzan's wishes before withdrawing her from life support, the Court stated that

> there can be no gainsaying [Missouri's] interest [in the protection and preservation of human life]. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.[204]

Similarly, the *Glucksberg* Court stated that

> [i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted suicide bans are not innovations. Rather, they are longstanding expressions of the

198. Burson v. Freeman, 504 U.S. 191, 198 (1992).
199. Id.
200. Id. at 194.
201. Id. at 198–199.
202. Id. at 199.
203. Id. at 200.
204. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 280 (1990).

> States' commitment to the protection and preservation of all human life.... [O]pposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages. 205

Reading the language of these opinions, with its emphasis on "longstanding" and "enduring" values shared by "all civilized nations," it is hard to see how the Court today could decide that the preservation of life and prevention of suicide are less than "compelling" state interests. However, establishing the existence of a compelling state interest is just the first step; the government would still have the burden of proving that its assisted suicide laws were narrowly tailored to advance its interests.

State X's assisted suicide law punishes anyone who aids a suicide by "intentionally advis[ing], encourag[ing], or assist[ing] another in taking the other's own life."206 As applied, then, this law punishes speakers who intentionally advise, encourage or assist suicide, and then only if the suicide is actually attempted or successfully completed. Thus, it does not cover anyone who *unintentionally* encourages or assists a suicide, even if a suicide is completed. Nor would it punish a speaker if no link at all could be drawn between the speech and the suicidal.207 Similarly, it would not cover anyone who intentionally encourages or assists a suicide, unless suicide is attempted or completed. Thus, this law would seem to be narrowly tailored to preserve the life of vulnerable, suicidal persons by punishing only the most serious cases of assisting suicide—those which are actually intended to, and do result in, a completed or attempted suicide. However, the Court might take the analysis a step farther, by analyzing whether there are less restrictive means available to advance the government's stated interests.

Because the Court considers the internet a public forum, it might look to see if suicide prevention programs or blocking or filtering software would be reasonable, less restrictive alternatives to punishing suicide-related speech. These alternatives might achieve the government's interests by insulating vulnerable people from harmful speech, rather than by punishing it. However, while suicide prevention efforts are important and families have some responsibility to protect their most vulnerable members, the fact is that many of these protective

205. Washington v. Glucksberg, 521 U.S. 702, 710–711 (1997).

206. Minn. Stat. § 609.215(1) (2011).

207. It is not clear whether State X courts would require the speech to be the "but for" cause of the suicidal act. It can certainly be argued that narrow tailoring would demand this.

measures are already in place, and have not effectively prevented vulnerable populations from easily accessing suicide-related cyber space. Therefore, application of assisted suicide laws to cyber speech which encourages suicide could have an incremental effect on saving lives and preventing suicide. Above all, if states have decided to punish assisting, encouraging or advising suicide, that behavior should not go unpunished simply because it occurs in the form of online speech.

CONCLUSION

In the past decade, thousands of readily-accessible, pro-suicide web sites have proliferated on the internet, allowing the exchange of detailed information on suicide methods to flow unchecked through message boards, chats and emails. Disturbing as this is, no current law explicitly prohibits it. Unless action is taken, speech which would otherwise be punishable will continue to flourish on the internet, circumventing traditional social controls. The majority of states have assisted suicide statutes which could be used to prosecute cyber speech that assists or encourages suicide. However, cyber suicide speech does not fit neatly into existing categories of unprotected speech, and under the current First Amendment test for illegal advocacy, punishment of cyber-suicide speech is likely to be foreclosed by the First Amendment. Because speech which is an integral part of a criminal action is not protected, speech which aids suicide by teaching or instructing methods of suicide can constitutionally be punished. Because assisted suicide has been illegal for more than 700 years, and speech counseling suicide was a felony at common law, courts should acknowledge speech which counsels or encourages suicide as a traditional category of unprotected speech. Finally, because states have compelling interests in preserving life, preventing suicide and protecting vulnerable persons from abuse, an assisted suicide statute as applied to cyber suicide speech will have a good chance of surviving strict scrutiny.